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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 820 - 822

IN THE MATTER
of
THE APPLICATION OF THE CITY OF NEW YORK, &c., RELATIVE TO ACQUIRING RIGHT AND TITLE TO, &c., CERTAIN PROPERTY, &c., NEAR BARREN ISLAND, &c., BROOKLYN, &c.,
(JAMAICA BAY NO. 1 PROCEEDING)

THE SAME: ORABOSS MEADOWS AND BUSHES MEADOWS
(JAMAICA BAY NO. 2 PROCEEDING)

THE SAME: MARINE 15TH STREET
(ADDITION TO MARINE PARK PROCEEDING)

GERRITSEN BASIN DEVELOPMENT CORPORATION,
Petitioner,

vs.

THE CITY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

In the Matter
of
the Application of the City of New York, &c., relative to acquiring right and title to, &c., certain property, &c., near Barren Island, &c., Brooklyn, &c.,

(Jamaica Bay No. 1 Proceeding)

The Same: Oraboss Meadows and Bushes Meadows

(Jamaica Bay No. 2 Proceeding)

The Same: Marine 15th Street

(Addition to Marine Park Proceeding)

Gerritsen Basin Development Corporation,
Petitioner,

vs.

The City of New York,
Respondent.

To the Honorable, The Chief Justice and the Associated Justices of the Supreme Court of the United States of America:

The Petition of the Gerritsen Basin Development Corporation respectfully shows:

Summary and Short Statement of Matter Involved.

The three above entitled proceedings were instituted by The City of New York to condemn certain lands in the County of Kings and State of New York, and they were tried together at a Special Term of the Supreme Court of Kings County, New York, starting on December 6th, 1937 and concluding on June 2nd, 1938 with one Record and with the understanding that all evidence offered applied to all three proceedings.

The Jamaica Bay No. 1 Proceeding was instituted by an Order of the Supreme Court, Kings County, granting condemnation, dated March 25, 1924 and entered and filed in the office of the Clerk of the County of Kings on the 26th day of March, 1924, upon the Petition of The City of New York verified on the 17th day of March, 1924, in pursuance of a Resolution adopted by the Commissioners of the Sinking Fund on the 1st day of November, 1923, and a Resolution adopted by the Board of Estimate and Apportionment on the 4th day of January, 1924, initiating and authorizing the institution of the proceeding and directing the vesting of title in The City of New York on the day after the date of the entry of the Order granting condemnation.

Title vested in The City of New York on March 27, 1924.

The Jamaica Bay No. 2 Proceeding was instituted by an Order of the Supreme Court, Kings County, granting condemnation, dated May 29, 1923 and entered and filed in the office of the Clerk of the County of Kings on the 31st day of May, 1923, upon the Petition of The City of New York verified on the 25th day of May, 1923, in pursuance of a Resolution adopted by the Commissioners of the Sinking Fund on the 15th day of March, 1923, and a Resolution adopted by the Board of Estimate and Apportionment on the 20th day of April, 1923, initiating and authorizing the institution of the proceeding and directing

the vesting of title in The City of New York on the day after the date of the entry of the Order granting condemnation.

Title vested in The City of New York on June 1, 1923.

The Addition to Marine Park Proceeding was instituted by an Order of the Supreme Court, Kings County, granting condemnation, dated March 15, 1937 and entered and filed in the office of the Clerk of the County of Kings on the 15th day of March, 1937, upon the Petition of The City of New York verified on the 8th day of March, 1937, in pursuance of a Resolution adopted by the Board of Estimate and Apportionment on the 5th day of February, 1937, initiating and authorizing the institution of the proceeding and directing the vesting of title in The City of New York on the date of the entry of the Order granting condemnation.

Title vested in The City of New York on March 15, 1937.

The tentative Decree on awards in each of the three above proceedings were made and filed in the office of the Clerk of the County of Kings on August 18th, 1938 and objections thereto were filed by the Petitioner herein. The Final Decrees in each of the three above proceedings were made by the Supreme Court, Kings County, on September 15th, 1938 and filed in the office of the Clerk of the County of Kings on September 16th, 1938.

Petitioner, Gerritsen Basin Development Corporation, appealed to the Supreme Court of New York, Appellate Division, Second Department, from the Final Decrees which affirmed the decision of the Special Term by a divided court, each of the Justices thereof writing separate opinions.

Petitioner then appealed to the Court of Appeals, which affirmed the majority decision of the Appellate Division, without opinion, and the Final Decree of the Court of Appeals affirming the decision of the Supreme Court was entered in the Supreme Court, Kings County, New York, on the 25th day of November, 1940.

The question before the several Courts was the construction of a grant given by the Dutch to certain persons named Hudde and Gerritsen, Petitioner's predecessors in title in 1636. The same patent had been the subject of an Arbitration proceeding in 1696 between the Petitioner's predecessors in title and the predecessors of The City of New York.

In that proceeding the Arbitrators found that the "certain kill coming from the sea" referred to in the patent, was a stream known as the Strom Kill.

In a prior proceeding involving this patent, the Appellate Division of the Supreme Court found that the kill coming from the sea was the Strom Kill and that the lands involved in these proceedings were within the Hudde and Gerritsen patent but in that proceeding the Appellate Division held that the Petitioner had not proven a clear chain of title. (*Gerritsen Marine Park*, 248 App. Div. 240, affirmed 275 N. Y. 456). No question has been raised as to Appellant's chain of title in the present proceedings, at least as to an undivided 93/640th thereof.

This Court has jurisdiction of these proceedings because of the fact that the condemnation proceedings were conducted pursuant to a Statute of the State of New York, i. e. the New York City Charter and the Resolutions aforementioned of the Board of Estimate of the City of New York and the conceded reversal of the prior decisions of the New York Courts by the said Courts, constituted an impairment of contract within the meaning of Article 1, Section 10 of the Federal Constitution.

Objection was made in the only pleading in the case i. e. the objections to the tentative Decree in the condemnation proceedings that the reversal of the Courts' decisions were contrary to the Constitution of the United States and the decision of the Courts of the State of New York (Record pp. 91, 124 and 148).

Questions Presented.

The questions presented to this Court, concisely stated, are these:

Did the decision of the Arbitrators in 1696, construing the patent, become a part of the title and patent particularly so in view of the fact that the predecessors in title of both the Petitioner and Respondent, The City of New York, were the parties to the Arbitration proceeding; and if it did become part of the title, did the decisions of the Court in the instant proceedings changing the interpretation and construction of the said patent amount to an impairment of the contractual rights of the Petitioner, under Article 1, Section 10 of the United States Constitution where such decisions were made under legislative authority authorizing the condemnation of the lands in question.

The other question involved is whether or not there was an impairment of Petitioner's contractual rights by the reversal of the decisions involving the construction of the grant that was concededly made by the New York Courts in the Gerritsen Marine Park case (248 App. Div. 240). The Court in that case held that the Hudde and Gerritsen patent covered the lands involved in these proceedings and that the Kill referred to in said patent was the Strom Kill. In the present proceedings the Justices of the Appellate Division admitted in their several opinions that they were reversing the decision made in the prior case because of a different interpretation which was placed upon the wording of the patent at the Special Term for Trials, by an archavist.

The Proceedings in Trial Court.

The proceedings were instituted by Orders of the Supreme Court granting condemnation (Record, pp. 69, 118 and 136). The Petitioner filed its claims (Record,

pp. 72, 121 and 139). Hearings were had starting on December 6th, 1937 and concluding on June 2nd, 1938. In the proceeding before the Trial Court the Petitioner herein, in support of its claim, offered in evidence the patent from the Dutch Governor VanTwiller to Hudde and Gerritsen dated June 16th, 1636 (Record, p. 265) and also the Colonial patents confirming the Dutch patent (Record, pp. 299-300) and also offered in evidence the record of the Arbitration proceedings of 1696 (Record pp. 335 to 342). At fols. 1011 and 1012, the Arbitrators in that proceeding found that the words "stretching in length from a certain kill or creek running almost north and so runs into the woodland" is meant only the running of the Creek almost north and not that the land ran almost northward from said kill or creek into the woodland.

This was an important finding so far as Petitioner's contention is concerned because if this finding is binding the decision in the instant cases were directly contrary to the said finding.

The Arbitrators adopted the description contained in the confirmatory patent from Governor Nichols in 1667 (Record, p. 300). The finding of the Arbitrators above referred to was expressly repudiated by the Appellate Division of the Supreme Court and the Court of Appeals of New York; the Appellate Division stating "This finding cannot be reconciled with the theory which we are about to accept" (fols. 7555-56). Evidence was received, of a New York archavist, to the effect that all prior translations of the Hudde and Gerritsen patent were inaccurate, including the decision of the Arbitrators of 1696. He also testified that the decision of the Courts in the previous proceedings interpreting the patent were inaccurate and that instead of the river, the Strom Kill being the kill running from the sea, it was a branch of that stream that was the kill referred to in the patent.

The Trial Court accepted the interpretation of the Hudde and Gerritsen patent placed upon it by Van Lear, and found against the Gerritsen Basin Development Corporation. Objections were filed to the decision of the Trial Court by the Gerritsen Basin Development Corporation (Record, pp. 91, 124 and 148) and it was set forth specifically that the tentative Decree as to said Damage Parcel was contrary to the truth and in violation of the Constitutions of the United States and of the State of New York and the Statutes of the State of New York and the decisions of the Courts of the State of New York.

The only pleadings in a condemnation proceeding in the State of New York are the claim and the objections to the tentative Decree. After the filing of the objections, the Final Decree was signed by Mr. Justice Lockwood and entered in the office of the Kings County Clerk's office on September 16th, 1938 (Record, pp. 19, 32 and 40). An appeal was taken from such Decree to the Appellate Division of the Supreme Court, Second Department.

At the Trial Court, Petitioner introduced numerous Exhibits and Deeds and showed an undisputed title to 93/640 of the Hudde and Gerritsen patent and it contends it proved title to the remainder of the patent.

Decision of Appellate Division.

The Appellate Division, by a divided court, Mr. Justice Haggarty dissenting, reversed its former decision in the Gerritsen Basin Development Corporation (248 App. Div. 240) relying solely upon the parole testimony of the aforesaid City expert, Van Lear, and disregarding the decision of the Arbitrators in the 1696 Arbitration. In the Gerritsen Marine Park Proceeding, the Court had before it all the translations of the patent that it had in the instant case. In the majority opinion in the instant case, it was stated:

> "It cannot be said that this translation was a new one for it accords substantially with several of the other versions which were received in the former proceeding. What is new, however, is the expert testimony that this version alone is an accurate translation of the Dutch patent and that the translation accepted by the Court in the Gerritsen Creek-Marine Park case was erroneous and vitally misleading." (Record, fol. 7537.)

In the former proceeding, the Court having before it all the other translations of the patent, had held unanimously that the lands in question were covered by said patent and then proceeded to state as follows:

> "On all of the proof, a complete consideration of which would expand this opinion to an inordinate length, we are of the opinion that it has been established with a reasonable certainty that the strom kill was the kill described in the patent and that the lands that are claimed by the Appellant, Gerritsen Basin Development Corporation, were within its confines." (248 App. Div. 240 at 247.)

The Appellate Division in the proceedings at bar reversed its former decision by relying solely upon the parole testimony of the aforesaid City expert as to what was meant by the patent according to his interpretation as a linguist of the Dutch meaning of certain words in his particular translation of the Dutch patent. To hold with the said expert, the Court found it necessary to set aside its unanimous decision in the former proceeding; it had to set aside the English confirmatory patent and to set aside the unanimous findings of fact and conclusions of law of the former 1696 Arbitration on the bounds of the said Hudde and Gerritsen Basin patent.

In the Appellate Division, the Court's attention was called to the fact that its previous opinion made the matter res judicata. (Point one of petitioner's brief in Appellate Division, page 8.)

Decision of Court of Appeals.

An appeal was taken to the Court of Appeals from the decision of the Appellate Division, and after argument the Court of Appeals unanimously affirmed the majority decision of the Appellate Division, without opinion.

In the Court of Appeals (p. 57 of the main Brief) the Court's attention was called to the Arbitration of 1696 and and at page 61 the point was made that the Arbitration award was res judicata as between the parties and at page 126 of Appellant's Brief, the petition herein referred the Court of Appeals to the opinion of Mr. Justice Haggarty in the former proceedings and the dissenting opinion of Mr. Justice Haggarty in the instant proceedings.

Reasons Relied on for Allowance of Writ.

The question involved is of great importance to the Petitioner. The value of the land taken by the City, it is estimated, is worth $1,500,000, from which should be deducted about $750,000 in taxes and assessments that will be due the City and have accrued in amount largely since the institution of the condemnation proceedings.

The Petitioner contends:

(1) That the 1696 Arbitration proceedings became a part and parcel of the title and of the patent under which Petitioner claims title to the lands taken by the City and that the decision of the New York courts rejecting the findings and decision of the Arbitrators of the 1696 Arbitration, said decision having been rendered in a proceeding conducted under the City Charter of the City of New York and pursuant to a Resolution of the Board of Estimate of the City of New York, and constituted an impair-

ment of Petitioner's title and contract within the meaning of Article 1, Section 10 of the United States Constitution.

(2) That the decision of the New York Courts reversing the decision of the same Courts involving the same patent and covering the property involved in this proceeding made pursuant to the said Statute, i.e., the City Charter of the City of New York and the Resolutions of the Board of Estimate of the City of New York likewise impaired Petitioner's contract and title under Article 1, Section 10 of the United States Constitution.

Your Petitioner respectfully shows to the Court that this matter is of general interest and of importance to the Bar of the United States in that it is on all fours with the case of *Muhlker* v. *N. Y. & H. R. R. Co.*, 197 U. S. 544, which has been distinguished on several occasions by the United States Supreme Court. That case held that where the law affecting real estate has been established by the Courts, the decisions must be deemed part of the title and that in subsequent condemnation proceedings, the Court may not reverse its prior decision.

Attached hereto is the Brief of Petitioner in support of this Petition, to which reference is respectfully made for discussion of the law involved and of the authorities in support of the rights claimed on behalf of Petitioner.

The opinion of the Appellate Division of the Supreme Court, which was affirmed without opinion in the Court of Appeals, and the dissenting opinion of the Appellate Division, is printed at page 2506 of the Record. The opinion of the Trial Justice at Special Term of the Supreme Court, is printed at page 2394 of the Record. No other opinions were rendered in this case.

The Briefs of Petitioner and Respondent before the Court of Appeals and the Appellate Division of the Supreme Court, are submitted with this Petition.

Wherefore your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the Court of Appeals of the State of New York, to the end that the judgment of the Court of Appeals of New York State may be reviewed and reversed by this Honorable Court.

GERRITSEN BASIN DEVELOPMENT CORPORATION,
Petitioner,

By THOS. L. ZIMMERMAN, JR.,
Counsel for Petitioner.

BRIEF OF GERRITSEN BASIN DEVELOPMENT CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Gerritsen Basin Development Corporation is concededly the owner of a 93/640th interest in the land remaining in the Patent that was granted by Governor VanTwiller to Hudde and Gerritsen in 1636 and, according to the Gerritsen Basin Development Corporation's contention, it is the owner of the entire balance of the property that remains in the said Hudde and Gerritsen Patent.

The Dutch grant to Hudde and Gerritsen was confirmed by the Colonial Governor Nicholls to Elbert Elbertsen, a successor in interest to Hudde and Gerritsen.

A dispute arose between Elbertsen and the Town of Flatlands, a predecessor of the City of New York, regarding the extent of the Hudde and Gerritsen Patent as confirmed by Governor Nicholls, and the matter was submitted to arbitration. Five representative men were chosen as Arbitrators and in 1696 they rendered a decision, which was entered in the Flatland Town Records, which if it had been followed in the proceedings in the instant case would have definitely confirmed title to the lands that were taken by the City of New York, in the Petitioner Gerritsen Basin Development Corporation.

The Patent involved in these proceedings was also before the Courts of New York State in the Gerritsen Marine Park case (248 App. Div. 240). In that case the Court held:

> "On all the proof, a complete consideration of which would expand this opinion to an inordinate length, we are of opinion that it has been established with reasonable certainty, that the Stromkill was the Kill described in the Patent and that the lands that are claimed by the appellant Gerritsen Basin Development Corporation were within its confines" (p. 247).

In the proceedings in the instant cases the Trial Court heard testimony of a Dutch translator, one Van Lear, who testified that the findings of the Arbitrators of 1696 were incorrect; that they did not properly interpret the Dutch Hudde and Gerritsen Patent and that Governor Nicholls' confirmatory Patent also was incorrect in its description, and who further testified that the Appellate Division in Gerritsen Basin Marine Park case was wrong in its interpretation of the patent.

The Trial Court following the oral testimony of Van Lear held that the original interpretation of the Patents were incorrect, although the same translation of the Patent was before the Courts in the prior proceedings.

The Appellate Division of the Supreme Court, each of the five justices writing a separate opinion, Mr. Justice Haggerty dissenting, upheld the Trial Court and reversed its unanimous decision in the former proceeding (258 App. Div. 191). By so doing, it set aside the English confirmatory Patent and also set aside the unanimous findings of fact and conclusions of law of the 1696 Arbitration on the bounds of the said Hudde and Gerritsen Patent. It also ignored many historical facts and determinations supporting the confirmatory Patent, which are set forth in the record. That the Appellate Division of the Supreme Court knew that it was overruling these previous decisions and confirmatory patents may be ascertained by the following extracts which we take the liberty of setting forth in full from the opinions of the justices of the said Court:

> "The principal obstacle to an acceptance of the present construction of the patent is found in the determination of a board of arbitrators appointed in 1696 to decide a dispute between the Town of Flatlands"—from whom the City now claims as successor—"and the heirs of Elbert Elbertsen who had succeeded to the Hudde and Gerritsen title"—from whom petitioner claims a direct chain of title. "The arbitrators made a lengthy decision containing find-

ings of fact and conclusions. * * * The arbitrators adopted the description contained in the confirmatory patent from Governor Nicolls in 1667. Their decision contains the following finding: '2d. We doe find according to our best understanding that by the words above mencond in van Twillers patent (stretching in length from a Certaine Kill or Creeke coming out of the sea, and soe runs almost north into the woodlawnd) is meant only the running of the Creeke almost north, and not to run almost a north line from said kill or Creeke into the woodland.' This finding cannot be reconciled with the theory which we are about to accept * * * " (fols. 7553-7555).

" * * * A finding of such antiquity should not be lightly disregarded. Yet there is reason to believe that the arbitrators who made it were themselves misled by an erroneous translation of the patent. The confirmatory grant of 1667, from which the arbitrators took their description, is the only extant translation which interpolates the words 'and soe runs' following the reference to the kill. The insertion of these words makes it appear that it was the kill which ran northerly to the woods. Yet if these words are omitted the northerly direction may reasonably be taken to relate back to the 'stretching' of the flat from the kill. Under the circumstances the finding of the arbitrators is of such doubtful value that it cannot be allowed to prevail over the evidence supporting a contrary finding" (fols. 7555-7556).

By Lazansky, P.J. (concurring):

" * * * The translation, accepted by all in the *Gerritsen Marine Park case* (*supra*), fortified as it was by the description in the Nicolls confirmatory patent of 1667 and the finding in the arbitration of 1696, both then deemed to be accurate, readily invited the view that the westerly bounds was the Strom Kill from the sea north and, therefore, tended to justify the inference that the ocean was the southerly boundary of the land granted by the patent. This meant, of course, as urged by claimants, that the lands in dispute were within the patent of 1636.

"But the corrected translation sets a new face on the situation. * * * (fols. 7563-7564).

"* * * Thus Mill Creek was the southerly boundary. Of course, this is not by any means conclusive, nor completely convincing. * * * (fol. 7568).

"There are a number of items upon which appellants" (petitioner) "may call to sustain their view. The Dongan grant of 1685 indicates that the ocean was the southern boundary of Flatlands, which seems to be presently conceded. The various grants of Gravesend were made, all of which were bounded on the south by the ocean. In the arbitration of 1696 it was found that the western boundary of Elbertsen's (now petitioner's) "land, granted by Governor Nicolls in confirmation of his purchase from Gerritsen growing out of the original Dutch grants, joins to the eastern-most part of the Gravesend town patent which ran to the ocean. In the Nicolls patent of 1667, the description was followed by the words 'TOGETHER with all the lands, Soyles, Woods, Meadows, flatts, Pastures, Marshes, Creekes, Waters, Lakes, ffishing, Hawking, Hunting and ffowling, And all other profits, Commodities, Emoulments, and hereditaments to the said Parcell of Tract of land & premises belonging or in anywise, appertaining with their and every of their Appurtenances and of every part and parcell thereof.' This it is said, refers to the 'Broken Lands' and, at least, indicates what it was thought that the original Dutch patent granted. It will be remembered that in 1664 the Indians conveyed Barren Island or the 'Broken Lands' to Tilton and Spicer and that an heir of Spicer conveyed to Elbertsen in 1681. It appears that in 1679 Elbertsen claimed title to the Island in an action which he brought for trespass. There are also some other items which, appellants" (petitioner) "argue, indicate that the 'Broken Lands' were included within the original grant. However, whatever doubt may be thrown on the conclusion reached by the trial court by reason of these various items submitted by appellants" (petitioner), "they are not sufficient to overcome the construction placed upon the original patent adopted by the trial court, starting with the corrected description as a basis" (fols. 7577-7580).

In condemnation proceedings in New York State there are no pleadings. The procedure in the City of New York is for the Board of Estimate to pass a resolution acquiring the lands about to be condemned. This resolution is passed pursuant to the City Charter of the City of New York, Chapter 378, Laws of 1897 as amended, which is an Act of the Legislature of the State of New York.

An order is then entered by a Justice of the Supreme Court of the State of New York acquiring the title for the City, claims are then presented by the different property owners setting forth their claim of title to the property, hearings are held by a Justice of the Supreme Court and he ascertains the damage and those entitled to such damages and enters a tentative decree. Objections, which are really the first pleading in the proceeding are then filed by the property owners who object to the Court's determination.

In the instant case, one of the objections filed by the Petitioner was that the finding of the Court was contrary to the Constitution of the State of New York and the United States Constitution, and the laws and decisions of the Courts of the State of New York (pp. 91; 124; 148). After hearing the objections the Court entered a final decree. In the instant case the appeal was taken from the final decree which overruled Petitioner's objections.

The Appellate Division sustained the Trial Court, with one dissenting opinion. In the Appellate Division the Court's attention was called to the fact that the prior decision of the Court and of the Arbitrators were binding upon the City of New York, and likewise on the appeal to the Court of Appeals. This fact was emphasized in Petitioner's brief. No findings or conclusions of law were made by the Appellate Division or the Court of Appeals.

POINT I.

The decision of the Arbitrators of 1696 and the decision in the Gerritsen Marine Park Proceedings (248 App. Div. 240) became part of the petitioner's grant or title and the decision of the New York Courts reversing the arbitration and its said prior decision constituted an impairment of petitioner's contract in violation of Article I, Section 10 of the United States Constitution.

In the cases *sub judicae* the Court in taking the property which Petitioner claims belongs to it did so pursuant to a legislative enactment, *i.e.*, the New York City Charter, and pursuant to the resolutions of the then governing body of the City of New York, the Board of Estimate, and it is submitted that this case is on all fours with the case of *Muhlker* v. *N. Y. & H. R. R. Co.*, 197 U. S. 544. In that case the Railroad Company was proceeding under a statute to condemn certain property which Muhlker claimed belonged to him.

Mr. Justice McKenna at page 561, said:

> "In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as its expressed rights of abutting property owners, to have been improvidently decided and the elevated railroad cases which were made its support, were distinguished." * * *

At page 570:

> "However, we need not go further than the present case demands. When the plaintiff acquired his title those cases were the law of New York and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without the payment of compensation."

In the instant case to sustain Petitioner's contention we had the confirmatory Patent of Nicholls of 1667, the Findings of the Arbitrators of 1696, and the decision of the New York Courts in the Gerritsen Marine Park case which held that the Hudde and Gerritsen Patent embraced and covered the property which was taken in condemnation in these proceedings. The only reason the Petitioner did not recover in the Gerritsen Marine Park case was because it had not sufficiently proven its chain of title. That question does not arise in the instant proceedings because the Petitioner definitely and clearly proved its chain of title and the City of New York did not in any of the Courts dispute this chain of title.

The constitutional question was raised by Petitioner in its pleadings and was never waived at any time by it. If the *Muhlker* case is sound law, the decision of the Court of Appeals of New York State in the instant case must be reversed.

In the case of *Taylor* v. *Ypsilanti*, 105 U. S. 60, Mr. Justice Harlan, at page 71 quotes from the opinion of Chief Justice Taney in *Ohio Life Insurance Company* v. *Debolt*, (16 How. 416, 432), as follows:

> "'The sound and true rule is that if the contract when made is valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligations cannot be impaired by any subsequent act of the Legislature of the state, or decisions of its courts altering the construction of the law.'"

In *Sauer* v. *New York*, 206 U. S. 536, Mr. Justice Moody, at page 549 said:

> "The plaintiff asserts that the case of *Story* v. *Elevated R. R.*, 90 N. Y. 122, decided in 1882 four years before he acquired title to the property interpreted the contract between the City of New York and the owners of the land abutting upon its streets as assur-

ing the owners of the easements of access, light and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of the contract as thus interpreted and that the judgment of the court denying him its benefits impaired its obligation. If the facts upon which this claim is based are accurately stated then the contract comes within the authority of *Muhlker* v. *Railroad Co.* 197 U. S. 544 which holds that when the Court of Appeals has once interpreted the contract existing between the land owner and the City that interpretation becomes a part of the contract upon which one acquiring land may rely; and thus any subsequent change of it to his injury impairs the obligation of the contract."

In *Louisiana* v. *Pilsbury*, 105 U. S. 278, Mr. Justice Field said at page 294:

"Whether such a construction was a sound one is not open to question in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction."

In *Douglas* v. *County of Pike*, 101 U. S. 677, Mr. Justice Waite at page 687 said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment: that is to say make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Petitioner realizes that this Court in the case of *Tidal Oil Co.* v. *Flannagan*, 263 U. S. 453, speaking through Mr. Chief Justice Taft said that it has been settled by a long line of decisions that the provisions of Section 10 Article I of the Federal Constitution protecting the obligations of a contract against state action is directed only against impairment by legislation and not by judgments of the courts, but in that case this Court pointed out that the *Muhlker* v. *N. Y. & H. R. R. Co.* 197 U. S. 544, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, were cases in which a statute had been passed. That is true of the instant case. There was a statute passed that authorized the condemnation, a similar statute to the one in *Muhlker* v. *N. Y. & H. R. R. Co.* Petitioner acquired title relying upon the 1696 Arbitration proceedings, which were an integral part of its title. Petitioner has spent large sums of money as evidenced by the record herein, in perfecting its claim in the instant proceedings, relying not only on the Arbitration proceedings of 1696, but upon the decisions of the New York State Court, which held that the Hudde and Gerritsen Patent covered the lands condemned by the City of New York in these proceedings.

The complete reversal by the New York Courts of their decision, it is respectfully submitted, is an impairment of petitioner's contract and of its title.

POINT II.

The legal questions involved are of great importance

Aside from the amount of money involved in these proceedings, which is very large and estimated to be from Seven Hundred Thousand to a Million and one-half Dollars, the legal question of whether or not the complete reversal of a State Court of its decisions affecting real property, and which decisions have been acted upon has

not been squarely passed upon by the Supreme Court since the decisions cited in Point I of this brief.

Chief Justice Taft in the case of *Tidal Oil Company* v. *Flannagan, supra,* indicated that this Court, unless a statute was directly involved, would not interfere with the decisions of a State Court which reversed prior decisions and affected contrasts thereby.

In the *Muhlker* v. *N. Y. & H. R. R. Co.* case, *supra,* the Statute was one which merely authorized condemnation proceedings. The Statute, by its wording, did not in any way reverse or change the decisions of the New York Court that had been rendered involving the right to easements of access, light and air. It was the decision of the New York Courts, acting pursuant to the Statute in new condemnation proceedings, that reversed the previous decisions of the said Courts. This is equally true in the instant case. It is submitted, however, that the Arbitration proceedings and the decision of the New York Courts in the Gerritsen Marine Park proceeding actually became part of the contract and the change of the decision reversing these prior pronouncements of the Courts under the Statute authorizing the condemnation, actually impaired petitioner's contractual rights.

This Court in reading the opinion of the Trial Justice will see that the said Justice was swayed by extraneous matters. His statement that the petitioner claimed property of the value of Ten Million Dollars was a gross exaggeration, if the values as established on property that was actually paid for by the City is a criterion. On such basis the total amount involved is approximately One Million five hundred thousand dollars, upon which there are taxes and assessments of over Seven Hundred Thousand Dollars due to the City of New York.

The Petitioner has definitely established a claim, if this Court should agree with its contentions, to a 93/640th part of that amount of money, which is a far cry from Ten Million Dollars. Much publicity was given to the trial court's decision in the New York newspapers before the case reached the Appellate Division of the Supreme Court.

The petitioner is calling these facts to the Court's attention because the Trial Court very obviously erred in its estimate of the amount of money that was involved in Petitioner's claim and we are doing so so that there may be no misapprehension as to the amount in controversy.

POINT III.

It is respectfully submitted that the writ of certiorari should be allowed to review the decision of the Court of Appeals of New York State in the instant proceedings and that upon such review the decision of the said New York Court of Appeals should be reversed.

Respectfully submitted,

THOS. L. ZIMMERMAN, JR.,
Counsel for the Petitioner
Gerritsen Basin Development Corporation.

MAR 19 1941
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

Nos. 820, 821, 822. October Term, 1940.

GERRITSEN BASIN DEVELOPMENT CORPORATION,
Petitioner,

against

THE CITY OF NEW YORK,
Respondent.

REPLY BRIEF OF PETITIONER, GERRITSEN BASIN DEVELOPMENT CORPORATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THOS. L. ZIMMERMAN, JR.,
Counsel for Petitioner,
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New York, N. Y.

March 17, 1941

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

Supreme Court of the United States

In the Matter
of
the Application of the City of New York, &c., relative to acquiring right and title to, &c., certain property, &c., near Barren Island, &c., Brooklyn, &c.,
(Jamaica Bay No. 1 Proceeding)

The Same: Oraboss Meadows and Bushes Meadows
(Jamaica Bay No. 2 Proceeding)

The Same: Marine 15th Street
(Addition to Marine Park Proceeding)

Gerritsen Basin Development Corporation,
Petitioner.

The City of New York,
Respondent.

REPLY BRIEF OF PETITIONER, GERRITSEN BASIN DEVELOPMENT CORPORATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent, The City of New York, in its Brief in Opposition to the Petition for a Writ of Certiorari, wholly circumvents the point raised by Petitioner that Petitioner's contract expressing its rights in and to the tract of real

estate involved in this matter has been impaired by the decisions of the New York Courts (Trial Court, 100 N. Y. Law Journal 271; affirmed 258 App. Div. 191; affirmed, without opinion, 284 N. Y. 109), which decisions purport to reverse not only a former unanimous decision (248 App. Div. 240; affirmed, without opinion, 275 N. Y. 456) but also an Arbitration Award made in 1696 in favor of Petitioner's predecessor in title and against Respondent's predecessor in title, upon the very issue, i. e., the title to the same tract of lands involved in this present matter.

Petitioner's claim of title is based upon an ancient Government Grant made in 1636 which was interpreted 60 years later in said Arbitration proceeding, and which interpretation, in favor of Petitioner, was affirmed 240 years later by the Appellate Division of the New York Supreme Court (248 App. Div. 240; affirmed 275 N. Y. 456), which Court stated that it had been established with reasonable certainty that the lands described in said ancient Patent of 1636, and interpreted by said Arbitration proceeding, and now claimed by Petitioner, Gerritsen Basin Development Corporation, were within its confines.

A particular contract involving title to real estate was thereby made and affirmed and must be given effect under the provisions of both the State and the Federal Constitutions. The later decisions of the New York Courts which are sought to be reviewed impair that particular contract (*Lehigh Water Company* v. *Easton*, 121 U. S. 388; *Appleby* v. *City of New York*, 271 U. S. 364). The argument of the Respondent herein is based solely upon some hurriedly thought-up testimony of a purported Dutch linguist who disagrees with the interpretation of the original Dutch Patent found by the Arbitrators (men of high standing and qualification in that Dutch community, Rec. Vol. 1, pp. 487-489) 240 years ago.

The Respondent, in its Brief, states that neither decision of the Courts of New York State held that the Arbi-

tration award of 1896 was invalid. This statement is definitely erroneous. The Appellate Division referring to the finding of the Arbitrators as to the running of the creek that is the boundary in dispute, said:

> "This finding cannot be reconciled with the theory we are about to accept (Fol. 7555) * * * Under the circumstances, the finding of the Arbitrators is of such doubtful value that it cannot be allowed to prevail over the evidence of a contrary finding. (Fol. 7556)

Similarly, in the supporting opinion of Mr. Justice Lazansky, quoted at p. 15 of Petitioner's Brief, he pointed out that the Court was disregarding the 1696 Arbitration and the confirmatory Nicholls patent and that the Court was also reversing its earlier decision. The Court of Appeals affirmed, without opinion.

The "fantastic" construction which Respondent claims Petitioner urges this Court to adopt is the construction that was placed upon the same patent by the Appellate Division and the Court of Appeals in the previous case. (Gerritsen Marine Park proceedings, 248 App. Div. 240, Affd. 275 N. Y. 456.)

The writ of certiorari should be allowed.

Dated, March 17th, 1941.

Respectfully submitted,

Thos. L. Zimmerman, Jr.,
Counsel for Petitioner
Gerritsen Basin Development Corporation

(28413)

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Supreme Court of the United States

Nos. 820, 821, 822. October Term, 1940.

GERRITSEN BASIN DEVELOPMENT CORPORATION,

Petitioner,

against

THE CITY OF NEW YORK.

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

March 13, 1941.

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Supreme Court of the United States

Nos. 820, 821, 822. October Term, 1940.

Gerritsen Basin Development Corporation,
Petitioner,
against
The City of New York.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

In each of a group of three condemnation proceedings wherein were involved inquiries into a series of old Dutch and English colonial grants to lands on Long Island, N. Y., dating from 1636, the petitioner has applied for certiorari, the assigned grounds being (1) that an arbitration award of the year 1696 has been construed in such a way as to lead to the disallowance of a fantastic claim erected by the petitioner upon its own construction of it, so that a violation of the contracts clause of the Constitution occurred; and (2) that when in two successive appeals to the appellate courts of New York involving two different groups of damage parcels taken in the same series of condemnation proceedings, the Court of Appeals, while consistently deciding against the present petitioner on both appeals, shifted its ground from a determination that the claimant failed to prove title to the damage parcels forming the subject-matter of the litigation, to a determination that the condemnor (the City of New York [respondent here]) had (as it had power under local law to do) affirmatively shown

title in itself, there was such an alteration of a rule of property as to offend against the principles enunciated in *Muhlker* v. *N. Y. & Harlem R. Co.*, 197 U. S. 544 (1905).

(1)

The decision sought to be reviewed (284 N. Y., mem. p. 109), and the prior decision (275 N. Y. 456) in the same series of condemnation proceedings involving different though adjacent parcels of land, are the only cases in the Court of Appeals of the State of New York construing the document known as the 1696 arbitration. Neither decision amounted to a holding that the arbitration award was invalid. Neither construed it in such a manner as to impair its obligation. When argument was had at the bar of the Court of Appeals, no contention was ever made that the 1696 arbitration was a nullity. The City took one view of its meaning, scope and effect, the petitioner took another. To reject petitioner's view and accept (tacitly) ours, is not to raise or decide a federal question under the contracts clause.

The leading case in this Court is *Lehigh Water Company* v. *Easton*, 121 U. S. 388 (1887), where this Court said (p. 392):

> "The argument in behalf of the company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may reexamine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract

may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

(2)

The instruments of title upon which the petitioner relied on both trials and on both appeals to the Court of Appeals (275 N. Y. 456; 284 N. Y., mem. p. 109) were substantially the same. The question on both trials and both appeals was: What did the Dutch grant of 1636, and the arbitration awards construing it, actually mean? To answer the question properly required counsel to furnish an accurate translation of the Dutch originals and to establish what were the long-vanished landmarks referred to as determinative of the boundaries of the grant.

On both trials the City claimed that title was in itself as successor to the town of Flatlands. On the first appeal the Appellate Division held (1) that the claimant had not established its title and so could obtain no award in condemnation; and (2) that the City had likewise failed to prove its title.

On the second trial, the City, in opposing the claimants' contentions, made renewed efforts to show title in itself. Its case was prepared with greater diligence than on the first trial, and by using the testimony of one Van Laer, a distinguished expert in Dutch titles, the City convinced all three Courts below that title was in itself.

We submit that when a negative decision which awarded nothing to the petitioner and made no finding as to who had title, is followed by a positive decision that title is in a named party (the City), the petitioner is no worse off than it was before; and hence is unable to show that a judicially established rule of property has been altered to its damage.

Certainly when a point of ancient history has been left open,* nothing in the federal Constitution should be construed to block the quest for truth, or to impose forever on titles to land a perpetuation of doubt and uncertainty. All the challenged decision did was to supplant a Scotch verdict with one in favor of the people of the City of New York.

Moreover, when proper weight is given to the circumstance, expatiated upon by the Trial Justice (Rec., Vol. 5, pp. 2396, 2404, 2406, 2445, 2446), that the present petitioner based its claim on nothing more substantial than a series of quitclaim deeds from persons who themselves, and whose ancestors and grantors before them, had over a period of 300 years never dreamed of putting upon the early Dutch and colonial grants the fantastic construction now urged by petitioner, the assertion that a rule of property has been altered to their disadvantage is revealed not only as obviously false but also as deserving to be regarded with the extreme scepticism reserved for those who seek to speculate in real estate at public expense.

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* In the first *Gerritsen* case, the Court of Appeals said (275 N. Y. 456, at p. 457): "Order affirmed, with costs, because of the failure of the claimants to clearly establish their title to the land in question. We do not pass upon the southerly boundary of the Hudde and Gerritsen grant. No opinion."

CONCLUSION.

The petitions for certiorari should be denied.

March 13, 1941.

Respectfully submitted,

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